SUPREME COURT, U. S.

No. 73-1756

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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RUTH E. BIDDLE, *Administratrix, Petitioner*

v.

JOHN S. BOWSER, *Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE Court of Appeals ~~SUPREME COURT~~ OF OHIO, Montgomery County

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

---

Ruth E. Biddle prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the Appeal of this case, said Appeal being from the Court of Appeals for Montgomery County, Ohio, designated in said Supreme Court of Ohio as number 73-988, 1974 term, *Ruth E. Biddle, Administratrix, Appellant v. John S. Bowser, Appellee.*

### 1(a). OPINIONS BELOW

The Opinion of the Court of Appeals for Montgomery County, Ohio, in this case, is not officially reported, as of this date. The case is designated as *Ruth E. Biddle, Administratrix of the Estate of John W. Priser, Plaintiff—Appellant v. John S. Bowser, Defendant—Appellee,* Case. No. 4229, and is printed in the Appendix herein at Page 20. Upon Appeal to the Supreme Court of Ohio, the case was assigned number 73-988, for the February, 1974 term, under the title of *Ruth E. Biddle, Administratrix, Appel-*

*lant v. John S. Bowser, Appellee,* and the Supreme Court of Ohio, *sua sponte,* dismissed the Appeal from the Montgomery Court of Appeals, without opinion, said copy of the *sua sponte* dismissal is printed in the Appendix herein at Page 25. A Petition for Re-hearing was denied by the Supreme Court of Ohio, without opinion. A copy of the Notification to Appellant of the denial is printed in the Appendix herein at Page 26.

## 1(b). JURISDICTION

(i) The judgment of the Supreme Court of Ohio was entered on February 1, 1974 (the time of entry not being noted under Ohio practice).

(ii) The Petition for Re-hearing thereto filed on behalf of the Petitioner herein was denied on February 22, 1974.

(iii) The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646 62 Stat. 929, 28 U.S.C.A. § 1257(3).

## 1(c). QUESTIONS PRESENTED FOR REVIEW

1. Is Section One of the Fourteenth Amendment to the Constitution of the United States violated when an Ohio trial Court grants a summary judgment, on the grounds of *Res Adjudicata,* when lawsuits filed prior to the adoption of the Revised Rules of Ohio Procedure (adopted July 1, 1970), seeking the same ultimate relief were based on different theories and different facts than the lawsuit filed since the adoption of the Revised Ohio Rules of Civil Procedure, *and* where a disputed issue of fact has never been litigated in a lawsuit filed since the adoption of Revised Ohio Rules of Civil Procedure?

2. Is Section One of the Fourteenth Amendment to the Constitution of the United States violated when, at the time of the entry of the summary judgment alluded to in the preceding question, the trial Court also enters a permanent injunction barring the petitioner from filing any further lawsuits against the respondent, *and* said trial

Court has not granted either a trial on the merits or an evidentiary hearing, to determine the propriety for issuing said permanent injunction?

3. Is Section One of the Fourteenth Amendment to the Constitution of the United States violated when the permanent injunction alluded to in the preceding question is grounded on the power of the Court of Equity of Ohio, under a "fact-pleading" system, actually required the multiple suits to narrow the issues involved in the litigation?

## 1(d). CONSTITUTIONAL PROVISION INVOLVED

This case involves the following italicized provisions taken from Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "... *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ... nor shall any State deprive any person of* life, liberty, or *property, without due process of law; ...*"

## 1(e). STATEMENT OF THE CASE
## A. BACKGROUND PRIOR TO LITIGATION

On April 14, 1937, John Priser, a prosperous Mortgageless farmer who lived in Perry Township, Montgomery County, Ohio, purportedly granted a deed conveying to John C. Bowser the family farm owned by John Priser and containing 60 acres. This deed was never delivered from Mr. Priser to Mr. Bowser with the intent that the property described in the deed should be conveyed, and Mr. Priser at no time ever intended to relinquish complete control over the instrument.

In fact, on April 14, 1937, John Priser was an old man, who was neither physically nor mentally able to take care of himself or his affairs, and this fact was known to John Bowser. The purported deed was recorded in 1937, and in spite of this fact old John Priser continued to live on his farm until his death in November of 1944.

Now at the time of his death, John Priser had a daughter named Ruth Biddle, who was married and lived in another part of the country. Due to the distance involved, Ruth had not seen her father for many years. When Ruth came home to attend her father's funeral, she found that the Bowsers had taken over the Priser's family farm and were claiming title under the deed purportedly executed by John Priser in 1937.

Ever since the day of her father's funeral in November of the year 1944, when she first learned that his property had been taken from him, and up to this present moment Ruth Biddle has determinedly and steadily and persistently made efforts to obtain what she asserts and continues to assert is her own rightful property.

The Plaintiff-Appellant herein is the heir of John W. Priser, while the Defendant-Appellee is the heir and successor in interest of John C. Bowser.

## B. LITIGATION COMMENCED IN 1944

On November 30, 1944, an action was commenced by this Plaintiff in the Montgomery County Court of Common Pleas, Case No. 95192, against John C. Bowser, for the purpose of attempting to recover title to and possession of the farm in question. The theory of the case in this action was that John Priser did not have the requisite mental capacity necessary to convey the property to John C. Bowser. The action was tried on its merits and a judgment was rendered in favor of Defendant, John C. Bowser. An appeal was taken to the Montgomery County Court of Appeals under Case No. 1899, and on April 15, 1951, the Court handed down a decision affirming the Court of Common Pleas. This Court of Appeals decision has never been journalized.

## C. LITIGATION COMMENCED IN 1956

Then, on January 26, 1956, a second lawsuit was filed in the Montgomery County Court of Common Pleas, Case No.

109402, by the Plaintiff against the then surviving heirs of John C. Bowser, which sought the same ultimate relief, but on different grounds. The theory of the case in this action was constructive trust and forged deed. The defense of Res Judicata was overruled and this case went to trial on the merits. This case resulted in a trial verdict for the Defendants, and was appealed to the Montgomery County Court of Appeals under Case No. 2950 and affirmed. Appeal was then taken to the Supreme Court of Ohio, Case No. 41273, which denied certiorari on December 13, 1967. Appeal was then taken to the Supreme Court of these United States, Case No. 159, October Term, 1968, which dismissed the appeal, and this was journalized in June, 1969.

## D. LITIGATION COMMENCED IN 1970

On April 30, 1970, a third action was filed in which Plaintiff sought the same ultimate relief, but on grounds different from those advanced in the first two actions. This action was also filed in the Montgomery County Court of Common Pleas and the theory of the case in this action was non-delivery of the questioned deed. Defendant filed a demurrer to Plaintiff's Petition, and the Court, treating the demurrer as a Motion to Dismiss, sustained the same and dismissed the action on July 29, 1970, on the grounds that it was apparent from the face of the Petition that the statute of limitations had expired. The decision of the Court was thereafter journalized on August 20, 1970, and an appeal was taken therefrom. On the 18th of June, 1971, the Court of Appeals for Montgomery County, Ohio, Case No. 3676, affirmed the decision of the trial Court, and the Opinion was journalized on August 6, 1971. Appeal was taken to the Supreme Court of Ohio, Case No. 71-260, where the Motion to Certify was overruled. Journalization was made on December 1, 1971.

The thrust of the Court of Appeal's opinion in this third action indicated that the defense of statute of limitations was valid because the Plaintiff had failed to allege in her Petition the filing and pendency of the two prior lawsuits;

which allegation were necessary to defeat the statute of limitations defense.

### E. LITIGATION COMMENCED IN 1972

Accordingly, the Plaintiff stopped the appeal process, and on January 20, 1972, filed a fourth action in accordance with the criticisms contained in the Court of Appeals opinion in the third case. The Plaintiff sought the same ultimate relief and, as in the third action, the theory of the case was non-delivery of the alleged deed. In her Complaint, the Plantiff alleged the three prior lawsuits in order to comply with the Court of Appeals decision by showing that the statute of limitations had not expired.

The Defendant filed a Cross-Complaint alleging the Plaintiff was engaging in vexatious litigation and praying for a permanent injunction restraining the Plaintiff from filing any further lawsuits seeking the same ultimate relief.

The Defendant filed a motion for summary judgment. The Court ruled:

1. Plaintiff's Complaint should be dismissed because the decision in the third lawsuit was Res Judicata to this lawsuit.
2. Defendant's Cross-Complaint should be granted and a permanent injunction was issued and served personally on the Plaintiff barring her from filing any further lawsuits against the Defendant seeking the same ultimate relief. (Note: No trial or evidentiary hearing was ever held to determine the propriety of hearing the injunction.)

An appeal to the Ohio Supreme Court followed which was dismissed sue sponte, and a Petition for Re-Hearing was denied. Petitioner therefore has filed this Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio.

### 1(f). FEDERAL QUESTION RAISED

#### A. In the Court of Appeals of Montgomery County, Ohio

(a) On March 13, 1973, the Common Pleas Court for Montgomery County, Ohio, handed down its decision, order

and final summary judgment, said judgment including a permanent injunction against the Petitioner, from pursuing any further litigation against the Respondent. The Federal question was first raised by the Petitioner in her Assignments of Error and Brief of Appellant, filed with the Court of Appeals of Montgomery County, Ohio, on April 16, 1973, pages 21, 22 and 23 of said document filed by Appellant contained the applicable references to the Federal question, and are included in the Appendix, in pages 41, 42 and 43.

A Refinement of the Federal question was raised in Appellant's Reply Brief and pamphlet of authority, subsequently filed with the Court of Appeals of Montgomery County, Ohio, on May 29, 1973. That portion of the document filed by the Appellant containing the reference to the Federal question is as follows:

> "The Ohio Rules of Civil Procedure was patterned upon the Federal Rules of Civil Procedure, and ORCP56 is virtually identical to FRCP56. *Moore's Federal Practice* (2 Ed), 2243, Paragraph 56.12, states in part as follows:
>
> > *'—provided that care has been taken by the district court in determining that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried, and that the party for whom summary judgment is rendered is entitled thereto as a matter of law.'*
>
> "The exercise of that 'care' is set forth, in easy to understand language, by the Supreme Court of the United States in the case of *Fountain v. Filson* (1949), 336 U.S. 681, as follows:
>
> > *'—that another issue not argued or sought in the complaint, except as a prayer for "other relief" gave the plaintiff grounds for recovery.' and, '—where it appears that there is no dispute as to any fact material to the issue being litigated. For here the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court.'*

> *'—Summary judgment may be given, under Rule 56, only if there is no disptue as to any material fact.'*
>
> "To deprive one party of an opportunity to dispute the facts material to a claim, after the issue has been brought into dispute by the opposing party, is reversable error."

In Appellant's application for reconsideration and supporting memorandum, filed September 24, 1973, in the Court of Appeals of Montgomery County, Ohio, a reference is made to the question of vexatious litigation, on pages 3 and 4 of said document, and is as follows:

> "This case is not vexatious litigation, nor is there present a multiplicity of suits, there was no full trial on the merits as required by OCR 65.
>
> The Ohio Civil Rule 65, requires that a full trial on the merits be held before a permanent injunction will be granted.
>
> There is no multiplicity of suits, since the plaintiff has filed only one law suit at a time, and in the same place each time, in accordance with existing law.
>
> The most diligent search of Ohio law failed to reveal an interpretation of vexatious litigation, however, those interpretations that were found failed to include the instant case at bar. Instead, the following definitions take the plaintiff-appellant's case out of that category;
>
> *'A proceeding instituted maliciously and without probable cause.'*
> *Paramount Pictures, ets v. Blumenthal,* New York, Vol. 11, New York Supplement (2d) p. 722.
>
> *'A kind of malicious prosecution, differing principally because based on a civil action.' —'It is when the party bringing the proceeding is not acting bona fide, and merely wishes to annoy his adversary; or when it is not calculated to lead to any practical result.'*
> *Calvo v. Bardolatta,* 112 Conn, p. 396. Vol. 157, Atlantic Reports, p. 311.
>
> *'A vexatious proceeding is one filed without reasonable or probable cause or excuse.'*
> *Gardner v. Insurance Co.,* Vol. 232 Missouri Ap-

peals, p. 1101; Vol. 115, New York Sup. Reports (2d) pages 4 and 7.

*'The suit must be filed not only without probable cause, but it must also be filed with malice.' Bridgeport Hydraulic Co. v. Pearson,* 139 Connecticut Reports, page 186.

The Settlement of genuine grievances in open Court, even the settlement of differences of opinion in some cases, is one of the precious freedoms guaranteed by our State and Federal Constitutions."

The Montgomery County Court of Appeals, in its opinion rendered July 30, 1973, treats the issues involved as follows, commencing on page 3, and continuing to page 5 of its opinion;

"In the present appeal, the appellant alleges two assignments of error: (1) that the trial court erred in sustaining the motion for a summary judgment and (2) that the trial court erred in granting the injunction.

With reference to the first assignment of error, and with a view to substance rather than form, we find no allegation in the pleading filed in the present case which will remove it from the grasp of the previous judgments entered between the same parties or their successors in interest. The 'new case' filed by the plaintiff is based essentially upon the allegation that the grantor did not intend to deliver the deed, but this claim would necessarily involve the same controlling facts which were directly in issue in the previous actions.

In *Ross v. Stricker,* 153 Ohio St. 153, the syllabus provides as follows:

'A point or fact which was actually and directly in issue in an action or in a branch of the same action and was there passed upon and finally determined by a court of competent jurisdiction may not be drawn in question in any future action or litigation between the same parties or their privies, whether the cause of action in the two actions or branches of the same action by identical or different.'

"To the same effect, see *Schimke v. Earley,* 173 Ohio St. 521; *Quinn, Auditor v. The State,* ex rel Leroy, 118 Ohio St. 48; *Hixson v. Ogg,* 53 Ohio St. 361.

In the case of *Norwood v. McDonald,* 142 Ohio St. 299, the Supreme Court established some guidelines which may be considered in determining the applicability of the doctrine of res judicata:

> 'To determine whether a second action is based upon the same cause of action as that litigated in a former action claimed to be a bar to the second action under the doctrine of res judicata, the primary tests are the identity or investitive facts creating the right of action in each case; the identity of the evidence necessary to sustain each action; and the accrual of the alleged rights of action at the same time.'

Here, all of the foregoing tests have been met, and the pleading itself, when construed most favorably to the plaintiff, does not provide for the factual exploration of any new avenues. See *Biddle v. Bowser,* Montgomery County Court of Appeals, Case No. 3676, June 18, 1971.

Once again applicable to the record in this case is the observation made on June 18, 1971, when the court, speaking through Judge Crawford, said:

> 'While there were slight variations in these cases, they all pursued the same objective, touching the same subject matter, and affecting the same parties or their successors in interest. Plaintiff has not only had her day in court, she has had months and years. As important as is the opportunity of a litigant to be heard in trial and upon appeal, thereafter it is equally important that a controversy should be brought to a close.'

In our opinion, the record supports the action taken by the Court of Common Pleas, and the first assignment or error will be overruled.

"The second assignment of error challenges the authority of the trial court to enjoin the commencement of further litigation directed to the issues which have been approached from various angles since 1944.

As a general rule, a court of equity may properly intervene to prevent vexatious and expensive litigation. 42 American Jurisprudence 2d 987, Section 206; 29 Ohio Jurisprudence 2d 348, Section 132. The rule was specifically applied in *Laursen v. Lowe,* 50 Ohio App. 103, where the court said:

> 'A court of equity may enjoin, as useless and vexatious litigation, the prosecuting of a suit already begun, and the bringing, by and against the same parties, of future similar suits, where the issues raised by said suit already begun have been adjudicated, and the purpose of that suit is not to litigate any new question but merely to harass and vex the defendant therein; and this is so although the defendant could defeat the suit already begun and the future suits, if any, by the plea in each one of res judicata: for under such circumstances equity does not regard that course as affording the defendant a complete and adequate remedy.'

In the *Laursen* case, the court, quoted from *2 Story on Equity Jurisprudence* (14th Ed.), 543, Section 1173 as follows:

> 'If suits might be perpetually brought to litigate the same questions between the same parties or their privies as often as either should choose, it is obvious that remedial justice would soon become a mere mockery; for the termination of one suit would only become the signal for the institution of a new one, and the expenses might become ruinous to all the parties. The obvious ground of the jurisdiction of courts of equity in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits.'

The prayer for injunctive relief invoked the discretionary power of the trial court, and the record fails to disclose an abuse of discretion. Hence, the second assignment of error is overruled.

### B. In the Supreme Court of Ohio

The Supreme Court of Ohio did not pass specifically on the Federal questions raised by Petitioner. However, it did dismiss generally with the following language, the contingents raised by Petitioner which were not specifically discussed in the Opinion:

> "This cause, here on appeal as of right from the Court of Appeals for Montgomery County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte

dismisses the appeal for reasons that no substantial constitutional question exists herein." (Appendix at page 25.)

## 1(g). REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS A DEPARTURE FROM MINIMAL STANDARDS OF PROCEDURAL DUE PROCESS AND SERVES NO LEGITIMATE STATE INTEREST.

When the new Ohio Rules of Civil Procedure came into effect on July 1, 1970, the pleading system changed from a "fact" pleading system to a system kown as a "rule" or "notice" pleading system. *Baldwin's Ohio Revised Code Annotated,* Fourth Edition, 1972 Replacement, Rules of Civil Procedure, Staff Notes, Pp 28, 29. The revised Ohio system of pleading is modelled very closely after the Federal Rules of Civil Procedure, and, consequently, the Ohio Code annotations and the intermediate courts of appeal are paying an increasing amount of attention to the U.S. Supreme Court decisions construing the Federal Rules of Civil Procedure, *Id,* at 30; *Washington County Farm Assoc. v. The B&O R.R. Corp.,* 31 Ohio App. 2d 84 (1972), citing *Conley v. Gibson,* 355 U.S. 41, 45 (1957). The Court in *Washington County Farm Assoc. v. B&O R.R. Corp., supra,* at 94, recognizes that "it is difficult to discard old concepts, but do it we must. Rule 1B places emphasis on liberal construction rather than technical interpretation."

The old concepts of technical interpretation of pleadings are well illustrated in *Norwood v. McDonald et al,* 142 Ohio St. 299, 52 N.E. 2d 67 (1943), during the heyday of the technical pleading era in the State of Ohio. In a case involving an election of remedies by the plaintiff, where the plaintiff chose a mutually exclusive remedy and lost in the first case, he was met with a plea of *res adjudicata* when he filed a second suit, utilizing the other remedy, which plea the Supreme Court of Ohio rules was inappropriate, holding, at 52 N.E. 2d 75, "If a plaintiff obtains a judgment granting him one of two alternative or mutually

exclusive remedies for the assertion of the same right or the same relief, he is precluded from thereafter maintaining an action for the other remedy . . . But, where a judgment is for the defendant in a suit based upon one of two mutually exclusive remedies, plaintiff is not precluded from thereafter maintaining an action based on the other remedy."

The delaying effect of the technical rules of Ohio civil pleading, as they existed at that time is further illustrated by another quotation from the Court's holding in *Norwood v. McDonald*:

> "Since there were two entirely separate and distinct causes of action involved in this litigation, the plaintiff was not required to prosecute them in one action. On the contrary, the plaintiff was entitled to pursue what appeared to him to be his most advantageous remedy, and, even though he was unsuccessful in that, he had a right, as shown in the course of this opinion, to pursue another less advantageous but nonetheless valid and appropriate remedy which he is pursuing in this action." *Id,* at 75.

In the light of this history of these pleading techniques, the treatment of the petitioner's cases by the Courts of the State of Ohio seems particularly harsh. The litigation commenced before 1970 utilized the techniques outlined by the Court in *Norwood, supra*, and when, after 1970, she pursued litigation founded on a theory that was not utilized in any prior litigation, the reaction of the Ohio Courts, in effect, is "Plaintiff has not only had her day in Court, she has had months and years. As important as is the opportunity of a litigant to be heard in trial and upon appeal, thereafter it is equally important that a controversy should be brought to a close." *Biddle v. Bowser*, Montgomery County, Ohio, Court of Appeals, Case No. 3676, June 18, 1972, p. 6 (Appendix page 23). Not only was the long course of the litigation not the fault of the petitioner, the Ohio Rules of Civil Procedure, prior to 1970, under the "fact pleading" system, required this approach to complicated litigation.

Petitioner contends that no legitimate state interest is to be served by the handling of cases, such as petitioner's by the Ohio Courts, in this fashion. *Henry v. Mississippi*, 379 U.S. 44, 13 L ed 2d 408, 85 S. Ct. 564, reh. den. 380 U.S. 926, 13 L ed 2d 813, 85 S. Ct. 878 (1965). Thus, litigation that could or would be considered vexatious under the new pleading system, the "notice-pleading" system cannot be so considered under the "fact-pleading" system, and was not so considered by the Ohio Court, but was considered the normal way of proceeding. *Norwood v. McDonald, supra.* Certainly, it is desirable for litigation or controversies to be brought to a close by the court system of the State of Ohio. It is quite another matter, however, when a litigant is forever prevented from pursuing her remedy by a permanent injunction enforced by the state court system, when during the entire course of the litigation, she followed, slavishly and painstakingly, the technical rules of procedure. A state interest is being served by clearing the dockets of one case in this manner, but the litigant's procedural rights have been seriously abridged, due in large measure, to the change of the theory of Ohio civil procedure, and the unfamiliarity of the Ohio Courts with the liberality with which the new rules were intended to be interpreted, indeed, have been interpreted, by both other state and Federal courts. *Washington County Farm Assoc. v. B&O R.R. Corp., supra.* This unfamiliarity of the Ohio Courts has created a patchwork pattern of appellate decisions regarding the trial courts' use of the summary judgment. See *Butcher v. Pollard*, 32 Ohio App. 2d 1, 288 N.E. 2d 204 (1972), where trial court was reversed; *Duke v. Sanymetal Products Co., Inc.*, 31 Ohio App. 2d 78, 286 N.E. 2d 324 (1972), where the trial court was reversed; *Landrum v. Dombey*, 30 Ohio App. 2d 200, 284 N.E. 2d 183 (1971), where the trial court was reversed; *Reynoldsburg Motor Sales, Inc. v. City of Columbus*, 32 Ohio App. 2d 271, 289 N.E. 2d 909 (1972), where the trial court was affirmed.

The revised Rules of Civil Procedure of Ohio, effective

July 1, 1970, will affect every civil action filed throughout that state for years to come. Based on experience with the rules in other jurisdictions, this Court has held ". . . that all pleadings shall be so construed as to do substantial justice . . ." *Conley v. Gibson, supra,* at p. 48. Petitioner contends that the Ohio rules, like the Federal rules, should "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Id, at 48; *Maty v. Grasselli Chemical Co.,* 303 U.S. 197, 82 L ed 745, 58 S. Ct. 507.

Finally, the correctness of the decision below, as far as it interprets the extent to which the local Ohio law permits the review of an asserted Federal right, is open to serious question. In *Henry v. Mississippi, supra,* at page 412, this Court states ". . . local rules do not necessarily prevail . . . Whether the right was denied or not given due recognition by the [state court] . . . is a question as to which the plaintiffs are entitled to invoke our judgment."

## 1(h). CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Ohio.

Respectfully submitted,

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